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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 246.

CHARLES CORYELL, *et al.*,

Petitioners,

—against—

JOHN S. PHIPPS and GEORGE J. PILKINGTON,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS.

T. CATESBY JONES,
LEONARD J. MATTESON,
Proctors for Petitioners.

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As is not infrequently the case, counsel for the respondent seeking to avoid review by this court of the decisions below asserts in the Brief for Respondent that the questions presented by the petition are of fact only. It is significant that in their statement of the facts and of the findings of the District Court, respondent's counsel has considered it necessary to make two assertions, which are at variance with the record.

At page 5 of the Brief for Respondent Phipps, it is suggested that the cause of petitioners' losses was the negligence of one Abel. It is noteworthy that none of the references in the brief in support of this suggestion is from the finding of either of the courts below. Indeed, the District Court found the exact contrary,—that negligence of Abel was not the proximate cause of the loss (R. 3587).

Similarly, at page 6 of the Brief for Respondent Phipps it is asserted that the District Court "made no findings as to the cause of the fire * * *." This assertion is

based solely on the fact that the findings made by the District Court as to the cause of the fire do not appear in separately numbered paragraphs in the document filed by the District Court on June 5th, 1941 entitled: "FINDINGS OF FACT AND CONCLUSIONS OF LAW" (R. 3582), but do appear in the paragraphs following the subtitle "Discussion" and preceding the heading "Conclusions of Law". Regardless of formality of arrangement, we submit that the findings by the District Court in these paragraphs are, in fact, the findings of the District Court of the ultimate facts of the case and were so intended. The findings in the preceding numbered paragraphs are not findings of the ultimate facts but merely summaries of evidence. In fact, the words "I find" do not appear in the numbered paragraphs but do precede the subsequent findings on which we rely. They are not to be disregarded as findings because of "inartificial" arrangement. *Nashville Interurban Ry. v. Barnum*, 212 Fed. 634, 639.

In the recent case of *Commercial Molasses Corp. v. New York Tank Barge Corp.*, both this Court and the Circuit Court of Appeals treated a statement by the District Court in its Conclusion of Law No. 2 to the effect that on the evidence "the cause of the accident has been left in doubt" as, nevertheless, a finding of fact. *Commercial Molasses Corp. v. New York Tank Barge Corp.* (C. C. A. 2), 114 F. (2d) 248, 250; 314 U. S. 104, 114.

At R. 3587 the District Court said:

> "The presence of gasoline fumes in the engine room, *I find* was the proximate cause of the damage done to the vessels of libelants."*

Again, in the following paragraph, the District Court said:

> "But with the passage of time some part of the machinery or equipment did leak and the great possibility of damage attendant upon the use of gaso-

* Italics in quotations ours throughout this brief.

line, brings into play the principle that negligence may be based upon circumstantial evidence alone. The respondent argues that there must have been some third person agency intervening which brought about the means whereby gasoline escaped with attendant fumes. There is no evidence of this, and we get into the realm of conjecture. Just when the defective condition of the tanks made them leaky is in doubt. Expert testimony on this is an unsatisfactory character of evidence. *I am satisfied, and find*, that there were gasoline fumes present in the engine room, and that their ignition into combustion and fire caused the damage" (R. 3587-8).

We submit that these are findings by the District Court as to the cause of the fire; that the District Court did find that the presence of gasoline fumes in the engine room "was the proximate cause of the damage done to the vessels of libellants" (R. 3587), and that these fumes resulted because "with the passage of time some part of the machinery or equipment did leak" (R. 3587); that prior to the fire "the defective condition of the tanks made them leaky" (R. 3588) and that the presence of the gasoline fumes in the engineroom and "their ignition into combustion and fire caused the damage" (R. 3588).

We submit further that these findings cannot be disregarded as such for the reasons stated in the brief of the respondent Phipps.

Not only did the District Court make these findings with respect to the cause of the fire; but the District Court further found that the existence of these conditions was the result of negligence of Seminole Boat Company, Phipps' puppet corporation. At R. 3588, the District Court found "For this the Seminole Boat Company was liable". On the same page, a little farther on, because of its erroneous view of the law as to the liability of the respondent Phipps for the negligence of his creature corporation, the Court held that Phipps was not chargeable with that negligence "Firstly, because the negligence was that of the Seminole Boat Company and not of Phipps;".

It was similarly argued in the Circuit Court of Appeals that the findings of the District Court to which we have referred were not proper findings. The Circuit Court of Appeals not only did not accept this argument but itself adopted the findings of fact made by the District Court (R. 3647-8).

We have pointed out in our petition and brief that the District Court made its findings and reached its conclusion that the respondent Phipps was not liable for the negligence of the corporation on the sole ground that there was "no fraud or other improper conduct or purpose in the creation or continued existence of the corporation" (R. 3589) and because the organization of the corporation was "free from any fraud or ulterior motive in the inception of its chartering and creation" or other elements "incident to the presence of bad faith" (R. 3587; Petition, pp. 6 and 7), and that because of this erroneous view of the law neither of the courts below made any findings as to control and domination of the corporation by the respondent Phipps (Brief for Petitioners, pp. 27-8).

Nevertheless, it is asserted in the brief for the respondent Phipps that the real question presented is—"Did respondent in fact so dominate the corporate owner of the 'Seminole' that the corporate entity had been abandoned and should be disregarded?" (Respondent's Brief, p. 10) and it is asserted "This presents only a question of fact which both Courts below found favorably to respondent" (p. 10).

On the following page, it is asserted the Courts below concurrently found these facts against petitioners. In support of this assertion, it is stated that "Petitioners' contention as to domination was squarely presented below—see the excerpt from our main brief in the Circuit Court of Appeals printed *infra* as Appendix A" (Respondent's Brief, p. 17). Obviously the question as to what was found by the Courts below is not to be determined by consideration of the arguments or briefs presented but by examination of the decisions themselves.

The statement that the Courts below found against petitioners on the issue of domination cannot be justified. A careful scrutiny of the findings of both Courts will show that no finding was made by either Court on the question of the domination of the corporation or of corporate independence.

In the absence of any findings by either the District Court or the Circuit Court of Appeals on the questions of domination or corporate independence, we have summarized the facts in connection with the corporate ownership of the "Seminole" at pages 2 to 5 of the petition, supplementing the findings of the District Court only by statements of undisputed facts taken from respondent's own evidence and largely taken from respondent's own summary of those facts, Respondent's Exhibit 4D, printed as Appendix A to the Petition and Brief for Petitioners.

These supplementary statements are not materially disputed in the respondent's brief. They are discussed at pages 11 to 14 of respondent's brief, where they are merely characterized as "assertions" and "complaints" and an attempt is made to minimize their significance. Taken together, the conceded facts, which we have recited from the respondent's own evidence, clearly establish, we submit, complete lack of all essentials of corporate independence in Seminole Boat Company, and for the reasons, and under the authorities, cited in the petition and brief, establish the liability of the respondent Phipps for the negligence of the corporation.

In the respondent's brief, an attempt is made by brief and inadequate summary to minimize or distinguish the authorities cited in the petition and brief relative to the liability of the corporate parent, individual or corporate, for the negligence of a creature corporation. The decisions which we have cited speak for themselves and have been discussed in the brief and petition. We shall not burden the court with further discussion of these authorities.

We have shown in our petition and brief that although each of the Courts below expressed the opinion that the respondent Phipps, if liable, would be entitled to limitation of liability, each based this expression on a ground in conflict with the decisions in the other circuits. The grounds for the expression of opinion by the two courts were, however, different.

The Circuit Court of Appeals based its expression of this opinion on the proposition that

> "no actual privity to or knowledge of the defective condition obtaining on the 'Seminole' was attributable to Phipps personally, and that none could be imputed to him since he had exercised due care and diligence in selecting competent men to man the vessel, and *had imposed upon them full duties as to inspection and maintenance* of her" (R. 3649).

The Circuit Court of Appeals in this statement adopts the view that complete delegation of an individual owner's responsibilities and duties to a competent* person, or persons, assures limitation of liability irrespective of the negligence, knowledge or privity of those persons.

We have shown in the Brief for Petitioners (pp. 28-30) that this view is in direct conflict with the decisions in the Second, Sixth and Ninth Circuits, which hold that where an individual owner completely delegates his duties and responsibilities for the inspection and maintenance of his vessel to another, that other is the owner's *alter ego*, and the privity and knowledge of that other is the privity and knowledge of the owner.

> *In re New York Dock Co.* (C. C. A. 2), 61 F. (2d) 777, 779;
> *The Silverpalm* (C. C. A. 9), 94 F. (2d) 776, 780;
> *In re Lakes Transit Corp. and James Playfair* (C. C. A. 6), 81 F. (2d) 441, 444.

* There is in fact no evidence in the record to support a finding that the persons referred to, *i. e.*, the officers and directors of the corporation, were competent.

Counsel for respondent Phipps supports the view expressed by the Circuit Court of Appeals and asserts that there is in this respect a difference between the position of a corporate and an individual owner (Respondent's Brief, p. 19). The cases do not, in fact, justify this contention and the decision of the Circuit Court of Appeals for the Second Circuit in *In re New York Dock Co.* (C. C. A. 2), 61 F. (2d) 777, is directly to the contrary. Respondent's counsel naively asserts that in that case "the court overlooked" the fact that the owner was an individual, an assumption which can hardly be justified.

As pointed out by Hutcheson, *C. J.*, in the case of *In re Jacobson* (S. D. Tex.), 52 F. (2d) 178, 180, there is no logical justification for the contention of respondent's counsel. Judge Hutcheson said:

> "It is my opinion that those decisions are illogical which hold that, where an owner delegates the job of furnishing a seaworthy vessel to another, he may have limitation but that, where he tried to make it seaworthy himself, he may not have."

The late Judge Hough in characteristicly vigorous language dealt with a similar situation in the case of *In re Phoenix Sand & Gravel Co.* (S. D. N. Y.), reported 1940 A. M. C. 508, 509, when he said:

> "If lack of actual knowledge were enough, imbecility, real or assumed, on the part of the owners, would be at a premium."

Although this was a case of corporate ownership, it is clear that Judge Hough had in mind individual as well as corporate owners, for he followed this statement by saying:

> "Such assumption of ignorance would be particularly easy on the part of corporate owners."

Respondent's counsel asserts that the acceptance of a position contrary to his contention, "Would destroy the limitation statutes so far as individual owners are con-

cerned as fully as if Congress repealed them". There is no justification for this statement. There is justification for holding the individual owner to at least as high a degree of personal responsibility as a corporate owner.

It can hardly be contended that the agents to whom the respondent Phipps delegated his responsibilities as owner, *i. e.*, the officers and directors of his creature corporation, were free from negligence or privity and knowledge, in view of the fact that for a period of years prior to the disaster they had redelegated "control and management" as well as the duty of regular inspection to Riley, who was concededly inexperienced and incompetent to inspect (R. 1454-7, 1472, 1480, 1595-6, 1637, 1640-1).

The ground stated by the District Court for the expression of its opinion that the respondent Phipps, if liable, would be entitled to limitation of liability is set forth in the following quotation from the opinion:

> "The character of negligence shown by this record was such that Phipps, as an individual, would not be precluded from asserting as a limitation of liability under the statute" (R. 3588).

The "character of negligence" which the District Court had in mind is not disclosed in this paragraph of the opinion but is characterized on the preceding page as "the failure to do or perform a duty, or non-feasance" (R. 3587). While this statement was made in connection with the District Court's discussion of "corporate insulation", in the absence of any other or different characterization of the negligence in the subsequent passage, it can only be inferred that it was the same type of negligence to which the Court referred in connection with limitation of liability. Otherwise the expression of the District Court is unexplained, and therefore meaningless.

We have shown in our petition and brief that the expression of opinion by the District Court that the character of negligence shown by the record as specified by the District Court, *i. e.*, the failure to do or perform a duty,

or non-feasance was not sufficient to preclude the respondent Phipps as an individual from limitation of liability under the statute, is in conflict with the decisions in the Second, Fourth and Ninth Circuits (Petition, pp. 15 to 17, 28; Petitioners' Brief, pp. 32-33). The decisions in those circuits hold that non-feasance consisting of the failure on the part of the owner in his duty to inspect the vessel, and to provide an adequate system of inspection by competent persons, results in the imputed knowledge and privity of the owner to the defective condition of his vessel, which requires the denial of a plea for limitation of liability. In the present case, it is the respondent's own evidence that the only system of inspection which had been provided for the "Seminole" for a period of years before the disaster consisted of the delegation by the officers and directors of the corporation, to whom respondent Phipps had entrusted the management of his vessel, of control and management and the duty of regular inspection to Riley, who was concededly inexperienced, and incompetent to inspect the vessel (R. 1454-7, 1472, 1480, 1595-6, 1637, 1640-1). The burden of proof was, of course, on the respondent Phipps to establish every element necessary to warrant a finding of the absence of privity and knowledge, including the fulfillment of his duty to provide both competent management and a regular and adequate system of inspection by competent persons (see summary of authorities, *The Silverpalm*, 94 F. (2d) 776, 777).

The suggestion that the innocent libellants, whose vessels have been destroyed, cannot complain of the lack of adequate inspections or of any system of inspection by competent persons because "an inspection was in progress at the time their loss occurred" (Respondent's Brief, p. 23) is specious indeed. Not only did their loss result from failure of inspection and failure to provide an adequate system of inspection by competent persons over a long period of time, but Abel, who is characterized as "an experienced boat captain", was not the captain of the "Seminole", and had had no previous connection with her.

He had been captain (by courtesy only) of much smaller vessels. There is no evidence other than the assertion of counsel that he was a competent or proper person to inspect the "Seminole". Even if the assertion in respondent's brief that "a system of inspection by the master has been held to be enough" (Respondent's Brief, p. 23) were accurate, which we question, Abel would not be within such decision since he was not master of the vessel.

The inspection of the "Seminole" in March, 1935, by a marine surveyor referred to in Respondent's Brief, page 23, was wholly inadequate, in particular, because he did not, and could not, under the conditions, examine the gasoline tanks which the District Court held became defective and leaky (R. 2215, 2248-9). He did not and could not under the conditions make any general examination of the vessel (R. 2231). It was not a thorough examination or a condition survey (R. 2224-5, R. 2228-9, R. 2236-8; R. 2246). He estimated from his examination at that time that it would have cost the owner about $2,500 to bring the "Seminole" to A-1 condition, which a condition survey would have required (R. 2238).

We submit, therefore, that the petition should be granted, and a writ of certiorari issued, and that this Court should review the decision of the Circuit Court of Appeals for the Fifth Circuit in this case so that the decisions and the law in admiralty cases in the various circuits may be reconciled on the important questions involved in this case as to the liability of an individual, who creates a corporation without corporate independence for the operation of his vessel, and who seeks limitation of liability by attempting to divest himself of his responsibilities as a vessel owner by delegation of those responsibilities to subservient employees through the use of the corporate device.

Respectfully submitted,

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